SUPREME COURT

NOV 2002

TERM

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS

Smolenski, P.J., Zahra and Collins, J.J.

SILVER CREEK DRAIN DISTRICT,
a statutory body corporate,

Plaintiff-Appellant,

-vs.-

EXTRUSIONS DIVISION, INC.,
a Michigan corporation,
- and -
AZZAR STORE EQUIPMENT, INC.,
a Michigan corporation,

Defendant-Appellee.

Consolidated With:

EXTRUSIONS DIVISION, INC.,
a Michigan corporation,

Plaintiff,

-vs.-

CITY OF GRAND RAPIDS, a Municipal Corporation, and KENT COUNTY DRAIN COMMISSIONER, jointly and severally.

Defendants.

_____/

Supreme Court No. 119721

Court of Appeals No. 216182

Kent County Circuit Court
No. 94-002550-CC

**ORAL ARGUMENT REQUESTED**

# BRIEF OF AMICUS CURIAE ACKERMAN & ACKERMAN, P.C. ON BEHALF OF NUMEROUS OWNERS IN YPSILANTI

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## *QUESTION PRESENTED FOR REVIEW*

In establishing just compensation in a condemnation case, must a trial court follow the statutory procedures set forth in the Uniform Condemnation Procedures Act when the Act provides a specific procedure to apply in ascertaining the effect of environmental contamination and clean-up costs as part of just compensation? Despite the reservation requirement of the UCP Act, the Court of Appeals reversed the trial court finding. Should the Act be followed so long as the application of the Act is constitutional?

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## I. INTRODUCTION

Just compensation is defined as "the amount of money which would put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred. The owner must not be forced to sacrifice or suffer by receiving less than full and fare value for the property. Just compensation should enrich neither the individual at the expense of the public nor the public at the expense of the individual." State Highway Commissioner v. Eilender, 362 Mich 697; 108 NW2d 755 (1961); In Re Grand Haven Highway, 357 Mich 20; 97 NW2d 748 (1959).

The Court of Appeals answered "no" to the following question, which it posed as an issue of first impression.

> Can environmental contamination and cleanup costs be considered in determining just compensation in a condemnation action?

[*Silver Creek Drain District v. Extrusions Division, Inc*, 245 Mich App 556, 562; 630 NW2d 347 (2001)]

This amicus brief is filed because the decision of the Court of Appeals is clearly erroneous and could have serious financial consequences and effects to not only State and local public agencies that condemn contaminated property for public purposes, but also to property owners who will again be placed in a field of uncertainty with the loss of the Constitutional protection of Just Compensation. This Amicus is being filed on behalf of owners of property located in Ypsilanti, Michigan, including Ypsilanti Iron and Plasber, Inc., who will be impacted by the Court's ruling in this matter. Further, a statutory framework has been provided in

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which the effects of contamination on the valuation process may be logically determined by the parties. As more fully described below, the statute is far from perfect to the extent that a perfect determination of Just Compensation may, at times, not occur. However, the statute attempts to provide a rational basis for the determination of Just Compensation to owners, without creating undue fiscal risk or burden on a condemnor.

As stated in the Michigan Department of Transportation's Amicus Curiae brief, the determination of just compensation is not an issue of simply calculating the owner's liability for cleanup costs, but rather to ascertain the fair market value given the highest and best use of the property.[1]

The Court of Appeals opinion may bar any consideration of contamination or cleanup costs in a condemnation case, which is in direct contradiction with statutory procedure enacted in the 1993 amendments to the UCPA.

This Amicus Brief will show how the Court of Appeals not only confused the distinct legal concepts, but eviscerated the intent and language of the UCPA to deliver a clearly erroneous decision.[2]

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[1] Although Amicus MDOT concluded that fair market value should be based on the current zoning of the property at the time of taking, this Amicus recognizes that the possibility of rezoning may be considered in determining market value. Department of Transportation v. VanElslander, 460 Mich 127; 594 NW2d 841 (1999), SJI2d 90.10.

[2] The Appellant and Amicae filing earlier have improperly concluded that there is something unfair in allowing for separate recovery from a condemnee, despite the language of the statute which allows a condemnor to initiate a separate action by reserving its rights. The statute contemplated a process by which a condemnor should only have to pay once for a property. This

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The relevant facts for this Court to determine are how the 1993 amendments to MCL 213.55 relating to environmental contamination are to be applied to a case in which there is contamination and a condemnor has reserved its rights to bring a separate cost recovery action without a request for a reversal of the reservation by the condemnee.

## II. STATEMENT OF PROCEEDINGS AND FACTS

This adopts the Statement of Proceedings and Facts set forth by MDOT. However, it again points out specific facts which require reversal of the Court of Appeals decision.

The specific relevant facts are that the appraisal and offer excluded the effect of contamination on the property. (Appellant's Appendix, 6a). The good-faith written offer and Complaint specifically reserved the condemnor's right to bring a Federal or State cost recovery action against the owner of the property. (Appellant's Appendix on appeal, pages 71a, 72a and 67a, paragraph 10).

The record shows no request of reversal of the agency's election of reservation of rights available to the owner if filed within the time prescribed to responsibly plead after service of

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statute did not intend that the owner should benefit with a windfall of not having the contamination considered. However, the statute provides a process by which the effects of the environmental contamination, be it cleanup costs, uncertainty of cleanup costs, or stigma created by the condemnation itself, may or may not be included in the condemnation filing.

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the complaint.

## III. ARGUMENT

The statutory procedural framework provided in the enactment for all condemnation cases in the State of Michigan should be followed so long as the application of the framework is constitutional and has an effect which does not abridge the constitutional rights of Just Compensation to the condemning agency or condemnor.

### A. Standard of review.

The Court of Appeals based its decision on an interpretation of the Uniform Condemnation Procedures Act. Interpreting a statute and applying the legal principles that govern the determination of Just Compensation present questions of law. This Court reviews questions of law de novo. Cardinal Mooney High School v. Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991).

### B. Preservation of the question.

Whether environmental contamination and cleanup costs as part of Just Compensation are to be ascertained pursuant to the statutory framework of MCL 213.56(a) was raised and was briefed by the parties and decided by the Court of Appeals.

### C. The Court of Appeals failed to properly review the factual findings.

It is without dispute that the government reserved its right to bring a Federal or State cost recovery action against the owner of the property. It is also undisputed that the owner did not file a request for a reversal of the agency's election of reservation of

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rights as required by MCL 213.56(a). The Court of Appeals simply did not address the evidentiary record, but held that:

> The mere fact that a property is contaminated provides no significant assistance in determining its fair market value. [245 Mich App at 567]

However, the Court correctly held that:

> Determining fair market value of a contaminated property is not as simple as deducting the estimated costs of remediation. (Id.)

So long as the government has the opportunity to seek payment of the cleanup costs, the Court of Appeals was correct in its determination. However, the Opinion leaves open the issue of the right of the condemnor to seek cost recovery.

The issue here is not whether the contamination should be excluded or included in the condemnation proceeding. Nor is it one of whether the contamination should be excluded or included in a future cost recovery action. The issue is whether the contamination should be included in both the condemnation Just Compensation proceeding and in a subsequent cost recovery action.

The statute, as written, does not address a situation in which the environmental contamination is considered in the condemnation proceeding and then the condemnor brings a subsequent cost recovery action. Given this, one must determine whether the contamination may be deducted twice, and whether a double deduction is constitutionally prohibited.

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## IV. HISTORICAL BACKGROUND

Prior to the 1993 amendments to Act 87, MCL 213.51 et. seq., when property was condemned, neither the condemnor nor condemnee knew whether to include or exclude cleanup costs or the value lost as part of the condemnation proceeding, or whether a waiver would occur barring the condemnor from seeking cleanup costs in a separate action if not included as part of the condemnation action.

In order to encourage urban redevelopment, while at the same time safeguard the public health and environment, legislation was needed so that the effect of contamination on the valuation process inherent in Just Compensation would be ascertained in a fair, expeditious, and most importantly certain manner.

While there were conflicting public policies as to how to handle contamination and cleanup as part of the condemnation process, the underlying public policy of certainty in the process was paramount. A balance allowing the government to exclude contamination and placing a duty on the owner to obtain a waiver in the valuation process remains subservient to the "police power" requiring that our environment maintain some aspect of cleanliness.[3]

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3 As part of the Chrysler condemnation, the uncertainties of the effect of condemnation were chaotic, to say the least. A number of cases were litigated in Federal Court, with varying results and difficulty of collection. Further, the cleanup costs being sought in Federal Court frequently were for a higher standard of cleanup than that which would have been contemplated in a normal marketplace transaction. City of Detroit v. A.W. Miller, 842 F.Supp. 957, Eastern District of Michigan 1994).

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### A. Underlying Public Policies as Applied to the Just Compensation Process.

A number of conflicting policies must always be dealt with when eminent domain procedural statutes are enacted. On the one hand, owners are to be placed in the same position as if the condemnation had not occurred. State Highway Commissioner v. Eilender, 362 Mich 697; 108 NW2d 755 (1961), In Re: Grand Haven Highway, 357 Mich 20; 97 NW2d 748 (1959). At the same time, there is always a concern of consolidating condemnation actions with determinations of liability for contamination when there are multiple potential responsible parties potentially liable under the contamination litigation. Cost recovery may require a federal court determination, thereby potentially requiring removal of an underlying condemnation case. Additionally, the issues as to assignment of liability between potentially responsible parties in the contamination case may present a separate set of issues far removed from the condemnation proceeding.

While the Uniform Condemnation Procedures Act contemplates divisions of proceeds as part of the single condemnation action, (See MCL 213.58(1) and 213.63), the division is made outside of the jury, leaving the jury to the determination of just compensation alone. By example, under prior statutes, title issues were not even a part of the condemnation proceeding.[4]

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4 MCLA 213.63 requires the court to apportion proceeds in the various relationships between the parties. An example of difficulty which existed under previous statutes is well illustrated by In re Widening of Woodward Avenue, 265 Mich 88; 251



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Generally, judicial policy favors single actions to determine a final result of all disputed issues between parties. However, if contamination was created by multiple adjacent landowners or prior owners, a determination of liability may be more properly handled in a separate action between the potentially responsible parties. Counterbalancing this is the proposition that an owner should be provided the opportunity to have certainty as to the determination of market value as part of a single proceeding.

## V. APPLICATION OF 1993 AMENDMENTS

The 1993 legislation amended only a portion of the Uniform Condemnation Procedures Act. While the Uniform Condemnation Procedures Act is a procedural act which all governmental agencies must follow to take property, because of the lack of relevance of contamination in the valuation process as of the 1980 passage, the Act simply did not contemplate how contamination effects on the value of property were to be considered. As amended, the Uniform Condemnation Procedures Act provided the agencies to either specifically reserve the cost recovery action against the property owner or establish the value of the property with consideration of

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NW 379 (1933), and is more fully described in Petition of City of Harper Woods, 353 Mich 166; 91 NW2d 277 (1958). In Petition of City of Harper Woods, there is an implication that the optionee has no rights once he deeds the property and retains the option on some type of percentage basis. MCLA 213.63 provides that the court shall be the factfinder in dividing the value of the leasehold. For an understanding of the substantial problems which occurred under previous acts, see Pierson v. H.R. Leonard Furniture Co., 268 Mich 507; 256 NW 529 (1934).

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the effect of contamination and potential cost recovery actions as part of the process. MCL 213.56(a)(1).

If the agency reserves its right to bring a separate state or federal cost recovery claim, the property owner may request the court to merge or consolidate the cost recovery action with the condemnation valuation proceeding under the statutory provision. There are four circumstances where the owner can require the government to merge the cases: if the parties stipulate that separate cost recovery claim rights are waived, if the property is a single-family residence, MCL 213.56 (a)(1)(b); if the property is agricultural, MCL 213.56(a)(1)(b); or if the owner is the only identified potentially responsible party for the contamination and the cost of remediation does not exceed the agency's appraised value of the property, MCL 213.56(a)(1)(c).

After the court enters an Order reversing the reservation, the agency may provide a revised good-faith offer taking into account the contamination and cost recovery potential actions on the value of the property. MCL 213.56(a)(2).

The UCPA provides for payment of Just Compensation at the time property is surrendered. MCL 213.59(5). Where the government is allowed to bring a separate state or federal cost recovery claim, it may withhold from the condemnation proceeds amounts necessary to secure funding for cleanup. MCL 213.58(2). The agency may withhold such funds as necessary to remediate the property after presentation of an affidavit and environmental report to the court showing the amount necessary to remediate the property. If the

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parties cannot agree on the likely costs of remediation, the court is empowered to determine how much money should reasonably be withheld. MCL 213.58(2).

The court may also order the release of withheld funds upon a showing that one of a number of factors is fulfilled. Among the factors which may trigger the release are that the requirements for remediation have changed (as occurred in the instant matter), the need for remediation is not required to the extent of the funds held on deposit, the remediation procedure was not initiated within two years of the surrender of possession, the costs actually expended are less than the estimated costs, or a court issues an order adjudicating remediation responsibility. MCL 213.58(3).

The intent of the Act amendments was to provide a procedure affording some sense of certainty of how contamination is to be dealt with in the Just Compensation framework. To show the uncertainty under the prior law, the following example is given. The trigger date for the statute of limitations under both the Federal and State cleanup acts is the date the cleanup project is completed. Although property was taken in 1987 for the Chrysler condemnation, the statute of limitations did not run for cost recovery actions because the cleanup was not completed until 1992. Often, many owners in the Chrysler action were informed that the valuation process included consideration of the contamination on the property. Yet, actions were brought against the owners over six years after the filing of the condemnation complaint seeking cost recovery.

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The cost recovery amendments of the UCPA in and of themselves do not determine the Just Compensation. Rather, the provisions are intended to create certainty as to the procedure of how Just Compensation is to be paid. The Act is intended to protect the agencies by securing funds that the agency and court believe are necessary to clean up the property while at the same time providing the owner with a prompt and expeditious method of obtaining, at a minimum, the amount all parties recognize as owing absent the potential for a cleanup.

The 1993 amendments were enacted at a time when contamination and its effects were treated in a very different fashion than only a few years later. In 1993, recovery actions were perceived as the only rational method to purchase potentially contaminated property. Because a condemnation proceeding is a compulsory proceeding in which the condemning agency has a public need for the property, the likely result was nothing other than just a straight cleanup cost as best estimated would be deducted. Under the 1993 amendment, the condemning agency had a choice of either merging the cleanup costs into the condemnation proceeding or separating the action for a subsequent cost recovery lawsuit. Legislation enacted in 1995 allowed for a wholly different form of cleanup, which dramatically altered the perception between market participants in the buying and selling of property which was potentially contaminated. The parties could buy and sell property, partly depending upon who was responsible for the contamination and potentially based upon the extent that the contamination could be controlled by other than

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cleanup methods. MCL 324.20126(a)A; 42 USC 9607(b). With the cleanup costs potentially limited by what the buyer and seller could do to control the risk apportionment and cost of a cleanup, the value of the property could be appreciably different under the subsequent environmental statute. Under such circumstances, one could value the property as determined in a market transaction by parties fully aware of the contamination, the effect of the contamination, including potential cleanup costs, and apportionment of liability between the seller and other parties. By example, if there is recognition of further risk of greater costs in the future than currently anticipated, the parties to a transaction may determine that the "stigma" in the form of the inherent risk would create more of an effect on the market value than the estimated cleanup cost deduction. On the other hand, if the parties agreed that there would only be certain uses to the property, which in no way enured to the detriment of the purchaser in his quest for the property at its highest and the best use, such could be a consideration in the purchase price.

Neither party in this proceeding took into consideration the effect of the contamination on the market. The market may conclude that there was a "stigma" in addition to the cleanup costs that created a greater deduction from the value of the property than a simple cleanup cost estimate. On the other hand, a buyer and seller may determine that the cleanup cost estimate is greater than the deduction because the parties recognize that there may be a change in cleanup cost requirements or the methodology of a cleanup

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cost will change dramatically in the foreseeable future. An example of the change in cleanup costs is in the utilization of bacteria to remediate gasoline contamination. Although the cost of cleanup may be the amount to be deducted from the value, there is also a possibility that the effect on market value could be greater or less than the cleanup cost.

However, allowing both considerations in the valuation proceeding and a cost recovery action would be a "double dip" against the owner, which is clearly not contemplated by the condemnation statute. Examples of double payment prohibitions are best exemplified at MCL 213.63(a), prohibiting duplication of payments to condemnees if the payment is being made by a separate process. Quite simply, to create a diminution in an owner's interest in property as part of the just compensation proceeding and then seeking damages which were contemplated in the diminution would violate the intent of both the Federal and State constitutional Just Compensation clauses. Not only would the owner not be made "whole", but the owner would be assured that he would be made less than whole if the owner is subjected to "double" deductions for environmental issues.

While the statute notes that the rights of the parties are never expanded nor diminished by inclusion of the contamination issue in a condemnation proceeding [MCL 213.58(2)], the Constitution requires that just compensation be paid. The statutory framework, although not contemplating the change in environmental cleanup procedures, may still be used as a rational

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method and procedure to determine just compensation. However, if applied so as to create a double deduction from the owner, the application of the statute is Constitutionally deficient. Likewise, barring any deduction as a matter of law would be incompatible with the Just Compensation clause.

## VI. PRACTICAL DIFFICULTIES OF THE ACT

Public policy strongly supports the cleaning up of our environment. However, this principal should not be utilized to infringe upon the constitutional rights of property owners that they be made whole when property is taken for a public purpose. The environmental amendments are intended to establish a process whereby the government can ascertain how to pay just compensation in many, if not most, circumstances. There are several limitations in the breadth of the Act.

First, the intent of the Act is that the owner should pay no more money than is necessary to clean up the property for its highest and best use. MCL 213.58(2) states:

> (2) If the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may allow any portion of the money deposited under section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel. An agency shall present an affidavit and environmental report establishing that the funds placed on deposit under section 5 are likely to be required to remediate the property. The amount in escrow shall not exceed the likely costs of remediation if the property were used for its highest and best use. This subsection does not limit or expand an owner's or agency's rights to bring federal or state cost recovery claims.

The plain language of the statute appears to allow the agency

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to bring a cost recovery claim separate and apart from the condemnation valuation proceeding. However, res judicata would apply if the cost recovery action claims were presented as part of the Just Compensation process. Further, a third party action by the owner against the agency would likely ensue if the agency ultimately sold or transferred the property to a buyer who sought cost recovery from the original owner.

If the property would have retained its industrial function in a normal market transaction and is valued as industrial, the Act does not penalize the owner by requiring the owner to pay for a more expensive cleanup that is necessary for the government's desired public use. There again, constitutional questions would be raised in a situation in which an owner was selling a property at its highest and best use, only to be later presented with a bill for a more expensive cleanup when an end user decided to use the property for a use requiring more expensive cleanup.

An owner of contaminated property has a choice in how to deal with contamination prior to the transfer of property. First, an owner can simply clean the property. When there is a need for a clear limitation on future use created by contamination, an owner selling the property may place deed restrictions on the future use of the property. The deed restrictions are encumbrances which could and should be valued as part of the valuation of the property by the appraisal expert. Restrictions may or may not lower the market value of the property from what the market value would have been if in a "clean" state. For example, if an industrial property

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owner owns a contaminated parcel, in some circumstances placing a deed restriction limiting future use to industrial uses only may have no impact on the value of the property. A baseline environmental assessment would be obtained by the buyer and future industrial use limited by the deed restrictions could continue on the property. An example of this type of deed restriction would be a limitation on the use of the ground water in an industrial area already serviced by municipal water and sewer. The restriction on utilization of water for well water purposes may or may not have an effect on the value of the property, but the amount can be readily ascertained by the expert.

Where restrictive covenants are placed on the property due to contamination, they can be easily considered in the valuation process. However, the restrictive covenants limiting use of contaminated property to an industrial use or in other circumstances for specific other uses is no different than any other restrictive covenant, easement, or encumbrance on property. A restrictive covenant is simply to be valued as part of the valuation process.

To place a condemnee in a position of being required to have the property valued in consideration of the contamination and subsequently allowing the condemnor's assignee to seek a cost recovery action would create a penalty outside the parameters of the constitutional Just Compensation requirement. What should be contemplated is a process whereby neither the condemnor nor the owner is enriched by either totally avoiding consideration of the

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costs and perception of risk inherent in contamination nor by requiring a reduction or double deduction for the effect of the contamination in the valuation process and then allowing a subsequent recovery action by the condemnor or its grantee.

The statute offers the opportunity for the condemnor to reserve its right to a separate cost recovery action. By 1996, remediation of contamination had drastically changed in Michigan. However, recognition is given in the statute to the release of escrowed funds where the requirements for remediation have changed. MCL 213.58(3).

Michigan has recognized there is an apportionment of costs between those parties that are truly responsible for contamination. Certainly one would not expect a condemnor to waive its right to seek cost recovery from liable parties. At the same time, an owner who could address the contamination without reducing the value of the property should not be penalized merely because the property is being forcibly disposed of by a condemnation proceeding or a subsequent cost recovery action. Further, there will be situations in which the contamination cost recovery and the stigma therein creates greater diminution in value than the estimated cost of remediation. The additional loss in value must be made part of the fair market valuation when the cost recovery action is not reserved.

Second, in the marketplace of a willing buyer and seller, the parties have the right to apportion the risk and liability between themselves for costs necessary to clean up contamination. In many

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circumstances, parties recognize that either regulations may change or the technology for the remediation may change prior to the actual cleaning up of the contamination. Such considerations may create a discount in the value of the property or the cost of remediation. Conversely, a "stigma" may attach to the risk inherent in contamination, with parties contemplating greater remediation requirements in the future for the existing contamination and corollary increases above cleanup costs.

## VII. APPLICATION FOR THE SUBJECT ACTION

The rationale established by the trial court was lacking and the Court of Appeals application of the statute was simply incorrect. The existing procedure has not been challenged by the parties. There may be some constitutional deficiencies in the provisions of the Act, but they were not raised as part of this Appeal. Quite simply, the 1993 UCPA amendment should be applied because it is not unconstitutional in the application to this case.

It is undisputed that the Appellant reserved its rights to bring a separate cost recovery action. The only request for a reversal of the reservation was provided by the Appellee.

Given that the statute specifically sets forth a separate cost recovery action, the trial court had no authority to either deduct money or consideration of contamination of the property nor to make such a determination. There is no showing of the affidavit required by the statute being filed by the Appellant so the funds could be withheld from the deposit. Quite simply, the payment of

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the Just Compensation in the amount determined by the Court should be awarded without consideration of contamination. The agency did not "present an affidavit and environmental report establishing that the funds placed on deposit under Section 5 are likely to be required to remediate the property" at the time in which it deposited the funds into escrow as required by MCL 213.58(2). Therefore, no money could be withheld. However, the condemnor retained whatever rights it would have under the statute not otherwise waived.

On its face, MCL 213.56(a) permits condemning agencies the opportunity to either seek a separate cost recovery action or to include the contamination action in the underlying condemnation case. Under this scenario, condemning agencies are assured that they will not be left "holding the bag" on environmental issues associated with the property taken, at least to the extent of remediation for the property's highest and best use. However, neither the Constitution nor reasonable application of the statutory provisions contemplates a condemning agency to benefit to the detriment of the condemnee by allowing the agency to collect twice for the same contamination. To reduce the just compensation to the owner because of potential recovery costs and then bring a second action for the recovery costs themselves would be less than Just Compensation for the market value of the property taken. The result would not only be unfair, but a violation of the Constitutional provision of Just Compensation that this Court has defined as placing the owner in the same position as the owner

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would have been in but for the condemnation.

The Court of Appeals finding that the environmental contamination cleanup costs may not be considered in determining Just Compensation excludes a basic part of the determination of fair market value of the property taken. This is because the fair market value consideration requires a determination of the property given all uses of the property.

## VII. CONCLUSION AND RELIEF REQUESTED

The question presented is not one of whether the reservation provisions of the statute are constitutional. The whole issue as presented by the Court is whether the contamination must be excluded from the Just Compensation proceeding. There are specific cost recovery provisions in the statute. The provisions are not being challenged as to constitutionality. In this specific situation, under MCL 213.56(a), unless this record shows that the party subsequently stipulated to include the contamination as part of the condemnation proceeding, under the terms of the statute, contamination consideration should have been excluded, with a reservation for the Appellant/Condemnor to bring a subsequent action. This is not to say that a condemnor may not bring a separate cost recovery action if it has properly reserved its right to do so, nor is to say that a condemnor may waive a separate cost recovery action. However, in this case, the records seem to be somewhat lacking as to whether the parties somehow formally stipulated to include the cost recovery requirements as part of the

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Just Compensation proceeding. However, the issues apparently were accepted as being raised by both parties during the trial. In both the offer and the complaint, there is a specific reservation for a cost recovery action to be presented in a separate proceeding.

Furthermore, an owner in certain circumstances may very well argue that a separate cost recovery action reservation violates constitutional rights to Just Compensation. However, the issue being limited to one of whether contamination can be included in a condemnation case should result in an affirmative answer and a reversal of the Court of Appeals opinion holding that cost recovery may not be considered as part of a condemnation proceeding.

Amicus Curiae, Ackerman & Ackerman, P.C., on behalf of numerous property owners, asks that his Honorable Court require that MCL 213.56(a) be applied, as its constitutionality has not been challenged.

Respectfully submitted,

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DATED: October 16, 2002

ATA\Amicus.Brf

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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

APPEAL FROM THE MICHIGAN COURT OF APPEALS

SILVER CREEK DRAIN DISTRICT,
a statutory body corporate,

Plaintiff/Appellee/Appellant,

-vs.-

EXTRUSIONS DIVISION, INC.,
a Michigan corporation,
- and -
AZZAR STORE EQUIPMENT, INC.,
a Michigan corporation,

Defendants/Appellants/Appeallees,

Supreme Court No. 119721

Court of Appeals No. 216182

Kent County Circuit Court
No. 94-002550-CC

**Consolidated With:**

EXTRUSIONS DIVISION, INC.,
a Michigan corporation,

Plaintiff,

-vs.-

CITY OF GRAND RAPIDS, a Municipal Corporation, and KENT COUNTY DRAIN COMMISSIONER, jointly and severally.

Defendants.
_____/

**PROOF OF SERVICE**

KATHLEEN SCHULZ states that she is an employee of Ackerman & Ackerman, P.C., and that on the 16th day of October, 2002, she did serve two copies each of ***Brief of Amicus Curiae Ackerman & Ackerman, P.C. on Behalf of Numerous Owners in Ypsilanti*** and ***Proof of Service*** in the above-captioned matter upon:

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- and -

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by depositing same in a government mail receptacle at Troy, Michigan, enclosed in a sealed envelope plainly addressed to such persons at said addresses with postage fully prepaid thereon.

Kathleen Schulz
KATHLEEN SCHULZ